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IN THE SUPREME COURT OF THE UNITED STATES

NO. 1109

EUGENE J. MARSHALL, MARION FRANCIS FOUNTAIN and ROOSEVELT TREMBLE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DONALD WHEELER JONES
DuPont Plaza Center
Miami, Florida

LEONARD R. MELLON
600 Concord Building
Miami, Florida 33130

EUGENE TANNENBAUM
Biscayne Building
Miami, Florida

COUNSEL FOR PETITIONERS

C I T A T I O N S

CASES: PAGES

Berger v New York
____ U.S. ____, ____ S. Ct. ____ 18 L. Ed 2d 1040..... 5

Blanchard v U.S.
5th Cir 360 F. 2nd 318,320..... 5

Katz v U.S.
____U.S.____ 88 S. Ct.____ 19 L. Ed 2d 576 4-6

Lopez v U.S.
373 U.S. 427 83 S.Ct. 1381, 10 L. Ed 2d 462 5

OTHER AUTHORITIES:

United States Constitution, Amendment IV 2,5

I N D E X

	PAGE
CITATIONS TO OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1-2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2-4
ARGUMENT AND REASONS FOR GRANTING THE WRIT	4-9
CONCLUSION	9
CERTIFICATE OF SERVICE	9
APPENDIX A (CONSTITUTIONAL PROVISION INVOLVED) APP.	10
APPENDIX B (OPINION OF COURT OF APPEALS BELOW) APP.	11
APPENDIX C (JUDGMENT OF COURT OF APPEALS BELOW) APP.	12
APPENDIX D (ORDER DENYING REHEARING BY COURT OF APPEALS BELOW) APP.	13

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on August 9, 1967; petition for rehearing denied on January 8, 1968.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals dated August 9, 1967, is printed in Appendix B hereto, infra, and is as yet unreported.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on August 9, 1967 (App. B & C, infra, pp. 11 - 12). Rehearing was denied on January 8, 1968 (App.D, infra, p 13). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

DID THE WIRETAPPING AND RECORDING OF PETITIONERS' CONVERSATIONS BY LAW ENFORCEMENT OFFICERS AND THE USE OF A "BUG" OR MONITORING DEVICE TO EAVESDROP ON OTHER CONVERSATIONS OF THE PETITIONERS, ALL OF WHICH WAS ACCOMPLISHED WITHOUT A SEARCH WARRANT OR OTHER PRIOR JUDICIAL SANCTION, CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE CONTRARY TO THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

WERE THE PETITIONERS DEPRIVED OF THE ELEMENTS OF A FAIR AND IMPARTIAL TRIAL WHEN THE TRIAL COURT ADMITTED INTO EVIDENCE PROCESSED TAPE RECORDINGS OF TELEPHONE CONVERSATIONS HAD BETWEEN THE PETITIONERS AND THEIR CHIEF ACCUSER WHICH IT PERMITTED THE JURY TO LISTEN TO WHILE THEY FOLLOWED THE CONVERSATIONS WITH A WRITTEN TRANSCRIPT?

WERE THE PETITIONERS DEPRIVED OF THEIR RIGHT TO CONFRONT WITNESSES AGAINST THEM GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN THE TRIAL COURT ALLOWED THEIR CHIEF ACCUSER TO REFUSE TO SUBMIT TO A FULL CROSS-EXAMINATION BY INVOKING THE PRIVILEGE AGAINST SELF-INCRIMINATION?

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affimration, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioners were charged in the United States District Court for the Southern District of Florida in a five count indictment with conspiring to violate 26 U.S.C. 4704(a) and 4705(a) (governing the illegal sale or distribution of narcotic drugs and 18 U.S.C. 201(b) (covering bribery of a public official). Additionally, petitioner Marshall was charged with four counts of violating 18 U.S.C. 201(c) (governing soliciting and accepting bribes) and in that connection petitioners Fountain and Tremble were charged as aiders and abetters of Marshall (R 1-9).

The government's chief witness at trial was one Holston J. Newbold, a convicted narcotics violator and felon (R162: Tr 51, 177-181), who testified that he paid the petitioners sums of money for

which he was to be afforded protection from arrest in his illegal narcotics operations (R162: Tr 10 et seq).

After Newbold reported the alleged transaction to the City of Miami Police Department, officers from that department, without securing a search warrant, installed, with Newbold's permission, a tap or monitoring device on the telephone in his apartment (R163: Tr 696-700). The tap operated from the power circuit of the telephone and was connected to a tape recorder which recorded any conversations over the phone (R163: Tr 701).

In the period between April 15, 1965, the date of the installation of the tap and April 20, 1965, the date of petitioners arrest, numerous calls between the petitioners and Newbold were monitored and recorded. The majority of these calls were between Newbold and Marshall, with two occurring between Newbold and petitioner Fountain and two between Newbold and Tremble (R162: Tr 138, 712-715). The calls from Newbold to Marshall were either to Marshall's home or to his office. The calls by Marshall to Newbold were usually made from Marshall's home or office (R162: Tr 838-901).

On April 20, 1965, officers installed a listening device in Newbold's apartment which they monitored in an adjoining apartment and by which they were able to monitor and tape certain conversations had that day between Newbold and the petitioners (R163: Tr 793-799).

The tape recordings in question were taken by the officers to the United States Army Broadcast Studios in Washington where the tapes were processed and copies made of them after the tapes had been run through a noise suppressor (R162:TR 722A-722M). The trial court over petitioners' objections, allowed the original tapes of said telephone conversations and the expurgated, processed tapes to be admitted into evidence, and also permitted the jury to look at copies of the transcripts while the tapes were being played (R163: Tr 834). Although

the court did not allow into evidence the tapes made in Newbold's apartment on April 20, 1965 between him and the petitioner, it did permit the officers who heard the conversations through use of the eavesdropping device to testify about them (R163: Tr 917-923, 977-979, 987-1000).

On cross-examination of Newbold an attempt was made to elicit from him the source of his income generally and specifically, the source of a portion of the money allegedly paid by him to the petitioners. In both instances the trial court sanctioned Newbold's refusal to answer such questions by permitting him to invoke his privilege against self-incrimination (R162: Tr 174-176, 218-219).

The Court of Appeals considered the questions presented to it concerning the said restriction on cross-examination, the use of the recorded telephone conversations and the Fourth Amendment question as to the use of the said monitoring devices. The court affirmed the judgment of the trial court, holding in connection with the Fourth Amendment question that an "unreasonable" search had not occurred in the instant case.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

Petitioners rely upon the following reasons why the petition for writ of certiorari shouldbe granted in this case:

1. The decision of the court of appeals in this case — holding that the tapping and monitoring of petitioners telephone conversations without a search warrant did not constitute an unreasonable search —conflicts with this Court's decision in Katz v United States, ____U.S.____, 88 S. Ct._____, 19 L. Ed 2d 576.

In ruling as it did on this question, the Court of Appeals quoted its own opinion in Blanchard v United States,(5thCir) 360 F 2d 318,320 to the effect that "listening to a telephone conversation

between an informant (who gave his consent to the 'listening')and the appellant by a Government agent is not such an invasion of a constitutionally protected area as to be a violation of the Fourth Amendment." The court further said that this Court's decision in Berger v New York, ____U.S. ____, ____S. Ct.____ 18 L. Ed 2d 1040, did not compel a different conclusion than the one reached by it. The lower court found especially compelling this Court's citation of Lopez v United States, 373 U.S.427, 83 S. Ct. 1381, 10 L. Ed 2d 462 in Berger,supra. Thus it says at page 11 (Appendix B, infra):

> "The Court's citation with approval of Lopez v United States, 373 U.S. 427, 83S.Ct. 1381, 10 L. Ed 2d 462 (1963) makes clear that Berger was not meant to hold unreasonable the interception of a telephone conversation with the permission of one party where there has been no unlawful physicial invasion of a constitutionally protected area."

Thus the lower court has resorted to the concept of the "constitutionally protected area" as the very "talismanic solution" which this court in Katz v United States, supra, has said it never suggested as a "solution to every Fourth Amendment problem," 19 L. Ed 2nd at 582, and which concept this court found as no longer at all controlling when it said at page 583:

> "...[O]nce it is recognized that the Fourth Amendment protects people —— and not simply 'areas' —— against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."

The eavesdropping and recording of the telephone conversations of the petitioners and the monitoring of other conversation had by them represented a violation of their privacy and clearly constituted a "search and seizure" under the Fourth Amendment. Since the eavesdropping in question was conducted without a seach warrant, the search and seizure did not comply with constitutional standards.

The instant case manifestly does not fall within any of the "specifically established and well delineated exceptions" spoken of by this court in Katz in which a search could be conducted "outside the judicial process," 19 L Ed 2d 585. Accordingly, the search, conducted as it was without the prior approval of a judge or magistrate, was per se unreasonable under the Fourth Amendment. Id. The petitioners certainly must be included among those spoken of by this Court in Katz, 19 L. Ed 2d at 586:

> "..Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored 'the procedure of antecedent justification... that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed."

2. Important and substantial issues of federal constitutional law are here presented concerning: (a) the elements of a fair and impartial trial and, (b) the right of a defendant in a criminal trial to full and complete cross-examination of the chief witness against him.

a. The tape recordings made of the monitored telephone conversations of the petitioners were processed through a "noise suppressor" at the United States Army Sound Laboratory in Washington, D.C., and filtered copies of the tapes made from the originals. The filtered tapes were admitted into evidence, and copies of a written transcript (prepared by an officer, Lt. Gracey, who had worked on the case) of the conversations contained therein, was furnished the jury at the time the tapes were played.

It was argued inter alia, both at trial and in the Court of Appeals that the use of the transcripts by the jury in conjunction with the tapes served to unduly emphasize that portion of

the prosecution's case. In disposing of this contention the Court of Appeals said at pages 13, et seq (Appendix B, infra):

> "...The jury was, somewhat belatedly, instructed to use the transcript for the limited purpose of identifying the voices. But, it is asserted it nevertheless was error to permit use of the transcripts, however accurate they may have been, because this amounted to a prejudicial emphasis of the conversations, i.e., the cumulative effect of transcripts plus tape so emphasized the conversations that their probative value was inflated in the minds of the jurors. The task of the District Court was to weigh the danger of such over-emphasis against the inconvenience and confusion of stopping the tape between each speaker and permitting Lt. Gracey to identify the next speaker. We cannot say that he arrived at the wrong balance."

There is a decided distinction between the instant case and the Hall decision. Lt. Gracey, who admittedly knew the voices on the tapes intimately, had to repeatedly replay the tapes (R163: Tr 714-715) in order to prepare the transcript. Such being the case, it could not be expected that the jurors, strangers to the voices, could accurately comprehend the conversations on just one hearing. Obviously they could not, and the transcript served — not the stated purpose of identifying voices — but that of furnishing evidence not otherwise admissable. This is clearly established by the fact that the jury sought the use of the transcript while in the course of its deliberations. Thus the present case can be further distinguished from Hall, because when the jury began its deliberations below it firmly believed that the transcript was in fact in evidence. Such was not the case in Hall.

b. The chief witness for the government below was the said Holston Newbold. On cross-examination he was questioned as to the source of the money that he used to travel to Kentucky, New Jersey, Canada and other places. He was also asked, in the course of the cross-examination, how he had obtained the money to make the

initial payment for the protection from arrest about which he had testified on direct examination. In both instances the trial court permitted Newbold to invoke his privilege against self-incrimination.

The Court of Appeals held that the first invocation of the privilege concerned a "collateral" matter, which had not been brought out on direct examination. It therefore reasoned that Newbold had not waived the privilege.

In ruling on the second invocation of the privilege, the Court of Appeals held that under the "plain error rule" (raised because petitioners had not requested the trial court to rule on the witness's refusal to answer) no substantial rights of the petitioners had been affected. In so doing, the court said at page 6 et seq (Appendix B, infra):

> "...Since the source of the money was not placed directly in issue, the inquiry was collateral. The proposed inquiry was one which, if permitted, could only have established the basis for the first of a long series of inferences necessary to reach a conclusion directly related to the issues in the case. In addition, the introduction by the prosecution of the bank's records, showing the existence of the account and a withdrawal of $800 at the time Newbold's testimony indicated the withdrawal occurred, suggests — but does not conclusively establish — that the inquiry would have been of minimal value."

Since the petitioners were charged with accepting bribes in the form of payments of money, a question as to the source of such money was a "direct" one and not "collateral." It was error for the Court of Appeals to conclude that the proposed inquiry "could only have established the basis for the first of a long series of inferences necessary to reach a conclusion directly related to the issues in the case." Id.

All that was necessary to defeat a conviction in this case was for one juror to firmly fix in his mind and to vote upon his convic-

tion that Newbold lied about having the $1,000.00 required for the initial payment and that therefore he did not make the payment about which he had testified on direct examination. Such an inference could have been reached through cross-examination regarding the bank account. The Court of Appeals admitted as much in detailing at footnote 3, page 7, "[t]he line of logical inferences" which might have been possible if full cross-examination had been allowed the petitioners.

CONCLUSION

Based on the foregoing reasons and citation of authority, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD R. MELLON
600 Concord Building
Miami, Florida 33130

DONALD WHEELER JONES
DuPont Plaza Center
Miami, Florida

EUGENE TARRENBAUM
Biscayne Building
Miami, Florida

COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served this 9th day of February, 1968, by mailing airmail postage prepaid to The Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and by first class postage to the Honorable Aaron A. Foosaner, Assistant U.S. Attorney, P.O. Box 1070, Miami, Florida.

By _____
LEONARD R. MELLON